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No. 92-1995

IN THE
Supreme Court of the United States
OCTOBER TERM, 1993

ADVANCE CHEMICAL COMPANY *et al.*,
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

BRIEF OF GENERAL ELECTRIC COMPANY AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Whether Section 107(a) of the Comprehensive Environmental Response, Compensation and Liability Act, 42 U.S.C. § 9607(a), prevents liable parties from raising any substantive challenges to specific costs incurred by the United States, including challenges to wasteful or fraudulently incurred costs?

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BRIEF OF GENERAL ELECTRIC COMPANY AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

INTEREST OF *AMICUS CURIAE*

Amicus General Electric Company ("GE") is a diversified technology, manufacturing, and services company. It presently has twelve business units with plants and offices across the country.

GE's interest in this case [1] stems from its involvement in site cleanups under the Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA"),

[1] In 1988, GE joined a group of other parties who contributed *de minimis* amounts of waste to the Hardage site and entered into a settlement with the government in which GE and the other settlors paid a portion of the government's past costs. Although GE resolved its liability to the government at this site, the position taken by the United States in its litigation against the petitioners—the issue before this Court—remains of vital interest to GE at other CERCLA sites.

commonly referred to as the Superfund statute. The United States, by and through the Environmental Protection Agency ("EPA"), has spent and will spend billions of dollars in public funds from the Superfund ("Fund") created under CERCLA, monies that EPA will seek to recoup from private parties, such as GE. *Amicus* in no way questions the United States' right to recoup reasonable cleanup costs. Nor does it question the need to respond appropriately to genuine risks to the public posed by abandoned hazardous waste sites. To the contrary, like most major manufacturers, GE has committed substantial resources under CERCLA to remedy the present effects of past disposal practices, despite the fact that such practices were entirely lawful at the time of disposal. Currently, GE is involved in the CERCLA process at more than 100 sites. At many of these sites, GE has initiated its own investigation and cleanup measures, has performed government selected cleanups, and or has reimbursed millions of dollars in government costs.

However, as it expects to be asked to fund a significant share of the government's costs at many sites, GE has a direct interest in whether the United States may recoup costs that are unquestionably unreasonable. Under the government's theory adopted by the Tenth Circuit, unreasonable and even fraudulently incurred costs are wholly immune from judicial review. *Amicus* is filing this brief to inform the Court of the compelling need for such review by highlighting the well-documented waste, fraud and abuse of CERCLA funds by EPA.[2] Absent judicial review, private parties would have no realistic forum in which to challenge government waste of the increasingly limited public funds available for cleanups. Conversely, the specter of careful review would create an incentive for the government to manage cleanups in an efficient and cost-effective manner.

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[2] Pursuant to Rule 37.2 of the Rules of this Court, the parties have consented to the filing of this brief. Copies of those letters have been filed with the Clerk of the Court.

STATEMENT

A. Statutory Framework

In enacting CERCLA in 1980, Congress authorized EPA[3] to clean up abandoned hazardous waste sites. Primarily enacted in response to a public outcry fueled by such notorious sites as Love Canal and Times Beach, CERCLA gave EPA a sweeping mandate to investigate and take response actions to mitigate threats to public health and the environment. 42 U.S.C. § 9604. To pay for this mandate, CERCLA initially provided EPA with a $1.6 billion trust fund, financed primarily by a special tax on private industry. As the Superfund statute and program developed over time, however, the focus shifted from emergency "removal actions" that addressed acute risks, to extremely costly and complex long term "remedial actions" designed to address even low-level risks to the public.[4] See 42 U.S.C. § 9621. The Superfund Amendments and Reauthorization Act of 1986 ("SARA"), extended CERCLA for five years and provided EPA with an additional $8.5 billion in funds. In 1990, another $5.1 billion was authorized.

In addition to authorizing action by the government, CERCLA provides that certain classes of parties (referred to as "potentially responsible parties" or "PRPs") should perform cleanups themselves and/or reimburse the Fund for costs of government response actions. *Id.* at § 9607(a). The United States may seek to recoup government costs by bringing a civil action under § 107 (a) of CERCLA against PRPs who have a statutorily defined nexus to the site. *Id.* at § 9607(c). Alternatively, under § 106 of CERCLA, either EPA or a court may order PRPs instead of EPA to undertake response ac-

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[3] CERCLA delegates authority to the President, who in turn has delegated his authority to EPA. Executive Order 12580, 56 Fed. Reg. 54757 (1987), *cited in* notes to 42 U.S.C. § 9615.

[4] *See* 42 U.S.C. § 9601(23)-(24) (definitions of "removal" and "remedial" actions).

tions. *Id.* at § 9606. Courts generally have imposed strict, joint and several liability on PRPs (unless the PRPs prove the harm is divisible), subject only to narrow statutory defenses.[5]

To expedite the cleanup process, CERCLA prohibits pre-enforcement judicial review of EPA's selected response action. *Id.* at § 9613(h). That is, a PRP may not challenge a particular EPA response action—be it an emergency removal or a $50 million remedial action—until the United States brings an enforcement action or attempts to recover government costs.

B. Superfund Cleanup Program

The procedural blueprint for EPA's Superfund program is the National Contingency Plan ("NCP"), 40 C.F.R. § 300 *et seq.*, promulgated under § 105 of CERCLA. See 42 U.S.C. § 9605. The NCP establishes procedures for identifying, investigating and selecting a response action for a site. The NCP does not, however, specify how to implement a remedial action: *i.e.*, how to design the site cap or how to build a ground water treatment system if that is appropriate.[6]

After completing a site investigation, EPA first issues a proposed remedial action, upon which the public may

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[5] Strict liability has been imposed on the theory that Congress sought to make persons pay for the present effects of their past disposal practices, even if the disposal practices were legal at the time of disposal. *See B.F. Goodrich Co.* v. *Murtha*, 958 F.2d 1192, 1198 (2d Cir. 1992) (holding CERCLA may impose strict liability on towns that sent municipal waste to regional landfill); *see also United States* v. *Aceto Agric. Chem. Corp.*, 872 F.2d 1373, 1380 n.8 (8th Cir. 1989). Whatever the merit of that judgment, it certainly does not extend to requiring those without fault to reimburse manifestly improper expenses incurred by the government that bear some nexus to the site cleanup.

[6] The 1989 NCP required that EPA conduct response actions "under existing programs and authorities. . ." 40 C.F.R. § 300.69(d) (1989). This would include federal procurement requirements outlined in the Federal Acquisition Regulations ("FARs"), 48 C.F.R. § 1 *et seq.*

comment, and then a final Record of Decision ("ROD") documenting EPA's final decision. The ROD states generally the goals and method of the EPA selected cleanup. However, it leaves open the details of how to design and implement the cleanup. As a result, many of the decisions that ultimately determine the actual cost of a cleanup are not made until long after a remedy is selected.

Since enactment of CERCLA, EPA has developed a large bureaucracy to run the Superfund program. The bureaucracy, in turn, has relied heavily on private contractors to perform EPA's mandate under CERCLA. Everything from investigations to removal and remedial actions have been performed or overseen by EPA contractors. Some 90% of EPA's contracts are multiyear, "cost-plus-award-fee" contracts, rather than fixed price contracts.[7] Under a cost-plus-award-fee contract, EPA must reimburse a contractor for allowable costs incurred. Based on EPA's evaluation of the contractor's performance, EPA may also pay the contractor a base percentage of such costs, plus an award fee. The base and award fees are designed to be used as incentives to encourage superior contractor performance. In 1982 and again in 1985, EPA awarded cost-plus-award-fee contracts valued at almost $1 billion to four engineering firms to perform work at NPL sites. In 1988 and 1989, under its Alternative Remedial Contracting Strategy, EPA awarded 45 additional cost-plus-award-fee contracts to 23 prime contractors worth a potential $6.6 billion over ten years.[8] Presently, EPA has approximately 600 active contracts worth approximately $3 billion.[9]

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[7] GAO, *EPA's Contract Management: Audit Backlogs and Audit Follow-up Problems Undermine EPA's Contract Management* 3 (GAO/T-RCED-91-5) (Dec. 11, 1990).

[8] GAO, *Superfund: EPA Action Could Have Minimized Program Management Costs* 3 (GAO/RCED-93-136) (June 7, 1993) ("GAO, *Program Management Costs, 1993*").

[9] *Hearing Before the Subcomm. on Superfund, Recycling, and Solid Waste Management of the Senate Comm. on Environment and*

REASONS FOR GRANTING THE PETITION

In this case, the United States Court of Appeals for the Tenth Circuit held that the government could recoup all the money it spent from the Superfund connected to the Hardage Superfund Site ("Site"). The court of appeals ruled that CERCLA did not permit liable parties to challenge the propriety of *any* of the United States' costs. Rather, the court interpreted Section 107(a)(4)(A) of CERCLA to permit the government to recover *all* the costs it incurs in connection with a particular site so long as EPA followed proper procedures when it selected a method of cleanup. Thus, no matter how unreasonable the actual cost or how arbitrarily or capriciously EPA may act in implementing the cleanup, none of the specific costs is reviewable by any court.

The perverse incentives created by this ruling are plain. Absent judicial review, there is no realistic limit on the way EPA uses, or abuses, the Superfund. Evidence gathered by the General Accounting Office (GAO) and EPA's own Inspector General demonstrates that despite repeated warnings, EPA has mismanaged enormous sums of Fund money. It has spent $7.5 billion over the past decade but has completed cleanup at fewer than one hundred of the thousands of sites identified. Countless more millions have been spent on "administrative costs" that have no connection to toxic waste cleanup, and EPA contractors have sought to charge the Fund under the guise of "indirect costs" with everything from tickets to sporting events to reindeer suits to be used at office Christmas parties. By holding EPA directly accountable in court, judicial review of government costs would create a strong incentive for EPA to manage its contractors and the Superfund more effectively and to eliminate such abuse of the public fisc. Consistent with the fundamental goals of CERCLA, limited public and private monies

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Public Works, 103d Cong., 1st Sess. (1993) (testimony of John C. Martin, Inspector General, EPA).

should be spent on cleanup, not squandered on waste, fraud and abuse.

The Tenth Circuit's decision, however, would force courts to turn a blind eye to such mismanagement and certify a blank check for EPA under CERCLA. Courts would not be permitted to look behind the barest of EPA proofs to ascertain the propriety of millions of dollars of expenditures. Given that it will cost many billions of dollars to clean up all of the nation's hazardous waste sites, such a ruling has implications far beyond this case.[10] Indeed, to date, EPA has placed more than 1200 sites on its National Priorities List, and there are thousands more sites yet to be evaluated. While PRPs can and will be expected to shoulder the burden of multi-million dollar investigations and cleanups of such sites, they should not be compelled also to pay for government waste, fraud and abuse.

The holding below squarely contradicts the settled presumption that absent clear and convincing proof that Congress foreclosed review, agency decisions adverse to parties' interests routinely are subject to judicial scrutiny. Here, there is ample basis to find that Congress expected that EPA's costs would be subject to judicial scrutiny. Moreover, allowing some review still would leave the scales of judicial review weighted heavily in favor of the government. Private parties would bear the burden of proof and would have to surmount the deference accorded EPA's decisionmaking by federal courts. Further, review of EPA's costs would not interfere with the pace of Superfund cleanups as CERCLA explicitly defers any review until the government seeks reimbursement of costs it already has incurred in cleaning up a particular site.

1. This Court has repeatedly reaffirmed that the presumption in favor of judicial review of agency action may

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[10] Office of Technology Assessment, *Assessing Contractor Use in Superfund* 1 (Jan. 1989) (America is facing $500 billion in cleanup costs over the next 50 years).

only be overcome by "clear and convincing evidence" that Congress intended to foreclose all review. *Bowen* v. *Michigan Academy of Family Physicians*, 476 U.S. 667, 671-2 (1986); see also *Traynor* v. *Turnage*, 485 U.S. 535, 542 (1988). An agency bears "the heavy burden of overcoming the strong presumption that Congress did not mean to prohibit all judicial review" of the action at issue. *Donlop* v. *Bachowski*, 421 U.S. 560, 567 (1975).[11] Here, there is no basis to conclude Congress intended for EPA to squander the Fund and then charge private parties for EPA's own failings without any opportunity to challenge EPA's costs. To the contrary, there is ample basis on which to conclude Congress expected EPA's costs would be subject to review.

First, nowhere in CERCLA did Congress explicitly prohibit judicial review of EPA's costs. Where Congress intended to foreclose judicial review under CERCLA it expressly stated its intent. See, *e.g.*, 42 U.S.C. § 9613(h). Section 107(a)(4)(A) of CERCLA, conversely, does not foreclose review of government costs. Rather, it provides that a PRP is liable for "all costs of removal or remedial action incurred by the United States . . . not inconsistent with the national contingency plan." 42 U.S.C. § 9607(a)(4)(A). Thus, Section 107(a)(4)(A) subjects a PRP to liability for *costs* that are not inconsistent with the NCP. The specific *costs* incurred, and not merely the overall selection of a general response action, are what Congress expected would be reviewed by a court. See *Colorado* v. *Idarado Mining*, 916 F.2d 1486, 1489 (10th Cir. 1990), *cert. denied*, 111 S. Ct. 584 (1991).

Moreover, such a delegation of authority to the Executive to recover costs from regulated parties should be

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[11] As this Court noted in *Bowen*, the strong presumption in favor of review finds support in a wealth of scholarly literature. 476 U.S. at 672 n.3 (citing 2 K. Davis, *Administrative Law* § 9:6, at 240 (1979); L. Jaffe, *Judicial Control of Administrative Action* 327 (1965); B. Schwartz, *Administrative Law* § 8.1, at 436 (2d ed. 1984); Shapiro, *Administrative Discretion: The Next Stage*, 92 Yale L.J. 1487, 1489 n.11 (1983)).

construed narrowly. For example, there must be a clear statement of Congressional intent to allow recovery of agency costs when such costs include administrative costs not directly benefiting the regulated parties. *Skinner* v. *Mid-America Pipeline Co.*, 490 U.S. 212, 224 (1989). Indeed, for that reason the Third Circuit recently held that certain EPA administrative costs were not "costs of removal" and hence not recoverable under CERCLA. *United States* v. *Rohm & Haas Co.*, No. 92-1517, 1993 WL 303148, at *7-10 (3d Cir. Aug. 12, 1993) (internal quotations omitted).

Further, after § 107(a)(4)(A) states what costs EPA may recover, § 107(a)(4)(B) specifies that a PRP shall be liable for "any *other* necessary costs of response incurred by any other person consistent with the [NCP]" 42 U.S.C. § 9607(a)(4)(B) (emphasis added). By using the phrase "any *other* necessary costs," and not merely "any necessary costs," Congress expected that the government's costs also had to be *necessary* costs or "other" would be superfluous.[12] CERCLA, like all statutes, must be construed to give effect to all of its terms. *E.g. Fidelity Fed. Sav. & Loan Ass'n* v. *De la Cuesta*, 458 U.S. 141, 163 (1982).

The Tenth Circuit adopted wholesale the government's view of § 107(a)(4)(A) of CERCLA, namely that "all costs of removal and remedial action" means *all* costs, no matter how unreasonable or unnecessary any particular cost item might be. To reach this result, the court of appeals effectively rewrote § 107(a)(4)(A) to mean that as long as the *selection* of the response action is not inconsistent with the NCP, the United States may recover all of its costs arising out of the cleanup of a site. The court did so primarily because it found EPA's NCP does

[12] Section 111(a) further indicates Congress' expectation that EPA response costs would be limited to necessary costs. There, Congress specified EPA shall not use the Fund for "administrative costs or expenses . . . unless such costs and expenses are *reasonably necessary for and incidental to* the *implementation* of this subchapter." 42 U.S.C. § 9611(a) (emphasis added).

not specifically detail how to implement response actions and incur costs, but only how to select response actions. As a result, the court refused to consider any substantive challenges to *any* of EPA's specific costs.

The lack of detailed guidance in EPA's NCP on how to conduct investigations or implement cleanup decisions is not clear and convincing proof that Congress intended to prohibit judicial review of EPA's costs. It is the intent of Congress that governs, and Congress explicitly required *both* that EPA *select* cost-effective response actions, 42 U.S.C. § 9621(a)-(b), *and* that the NCP contain a "means for *assuring* that remedial action measures are cost-effective" when implemented. *Id.* at § 9605(a)(7) (emphasis added).[13] The fact that EPA has promulgated an NCP that does not explicitly regulate each EPA cost does not lessen Congress' requirement that EPA implement cost-effective response actions.

Nor should silence in the NCP mean that PRPs are without *any* recourse to challenge clearly wasteful or wholly fraudulent costs. Common sense dictates that EPA should be held to a standard of reasonableness to check its spending authority under CERCLA. As this Court has recognized, even wholesale delegations of authority to an agency contain the implied condition that the authority should be exercised reasonably. *Barlow* v. *Collins*, 397 U.S. 159, 166 (1970).

In addition, even under the NCP, there is a basis for review. For example, the NCP's requirement that response actions be conducted under "existing authority" forms a basis for courts to look to federal contracting

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[13] The drafters of the 1986 amendments to CERCLA confirmed that § 121 of CERCLA requires remedial actions to be both selected and *implemented* in a cost-effective manner. As Senator Mitchell explained:

> Once the remedy has been selected, the cost-effectiveness requirement is applied to its implementation. Implementation of the remedy would involve choosing the least costly methods and contractors which will effectively carry out these alternatives.

132 Cong. Rec. S14913 (daily ed. Oct. 3, 1986).

law and associated standards to determine what contract costs are reasonable, allowable and allocable. Thus, there certainly is "law to apply" to evaluate EPA costs. See *Donlop, supra; Citizens to Preserve Overton Park* v. *Volpe*, 401 U.S. 402, 410-13 (1971). Moreover, to the extent those standards are applied, EPA would have recourse against the contractors for any costs incurred by it deemed not to be proper by a court. See, *e.g.*, 31 U.S.C. §§ 3729-3732 (False Claims Act); 41 U.S.C. § 604 (Contracts Disputes Act).

Finally, judicial review of EPA's costs would not slow down the pace of cleanups because CERCLA explicitly forecloses pre-enforcement review of cleanup decisions. 42 U.S.C. § 9613(h). Nor would it impose an unreasonable burden on the United States. To the contrary, the parties challenging the government's costs still would bear the burden of proving that EPA's costs were improper. Moreover, EPA's costs would be accorded appropriate deference as it is the agency primarily charged with implementing CERCLA.[14]

In sum, review of the Tenth Circuit's decision will promote Congress' manifest purposes in enacting CERCLA without significantly harming EPA's enforcement efforts. On the other hand, failure to correct the Tenth Circuit's holding will permit EPA's fiscal irresponsibility in managing the program to continue unabated and squander limited public and private funds that could otherwise be applied to cleanups. Such as outcome should be rejected.

2. The effect of foreclosing judicial review of EPA's costs is a matter of national importance that warrants this Court's review because the ruling below perversely encourages mismanagement of the Fund by EPA. EPA is allowed to spend money from the Fund at will, and the PRPs who ultimately foot the bill may not raise any

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[14] The specter of judicial scrutiny, however, would likely provide a healthy check on EPA's use of limited Fund monies. To be sure, it would provide EPA with an incentive to review more carefully the actions of its contractors.

challenges to the government's spending. Yet, the legacy of EPA's management of the Fund is rife with waste and abuse, particularly EPA's management of its multi-billion dollar contracts. Indeed, a report prepared for the Senate Budget Committee found that EPA's Superfund contractors spend from two to five times as much money as private parties would spend to perform the same work.[15] As such, the General Accounting Office (GAO) has identified Superfund as one of 16 federal programs most vulnerable to waste, fraud and abuse.[16]

By way of example, a 1992 GAO report alleged that one of the largest EPA contractors, CH2M Hill,[17] included in its 1991 "indirect costs" pool, more than $2 million for lavish office parties, football tickets, fishing licenses, chocolates imprinted with the company logo, travel for executives' spouses to Hong Kong, even a reindeer suit for an office Christmas party.[18] This GAO Report almost certainly is only the tip of the iceberg. GAO audited less than 1% of more than 4.5 million transactions.[19] EPA's Office of the Inspector General similarly questioned more than $20 million in overcharges

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[15] Majority Staff Committee on the Budget, U.S. Senate, *Management of Superfund* 2 (August 1990) ("*Management of Superfund*") ("[s]uperfund contractors have collected large sums of money, but have often performed poorly and at excessively high cost").

[16] *E.g.*, GAO, *Superfund: Actions Needed to Correct Long-Standing Contract Management Problems* 1 (GAO/T-RCED-92-78) (July 8, 1992) ("GAO, *Long-Standing Contract Management Problems, 1992*").

[17] CH2M Hill was one of EPA's primary contractors for the Hardage site.

[18] *EPA: Contract Mismanagement: Hearing Before the Subcomm. on Oversight and Investigations of the House Comm. on Energy and Commerce*, 102d Cong., 2d Sess. 172-187 (1992) (statement and testimony of J. Dexter Peach, Asst. Comptroller General, GAO).

[19] *Id.* at 198. The absence of judicial review will ensure that the full extent of the fraud will never be uncovered because federal audits could never begin to review even most of the site specific costs incurred.

and alleged double billings by CH2M Hill in a limited audit of 1987-1989 charges.[20]

Similar charges to the Fund for office parties and tickets to sporting events have been identified by a June 1993 GAO audit report of selected accounts and invoices of Arthur D. Little, Inc. and Metcalf & Eddy, Ltd.[21] These audits "find yet another contractor abusing the public trust and raiding the public purse while the agency charged with oversight slumbered peacefully."[22] Yet, under the court of appeals' "all costs" holding, *none* of these types of costs could be brought before the reviewing court.[23]

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[20] *Id.* at 142-163 (statement and testimony of John C. Martin, Inspector General, EPA). An EPA IG audit of 1987 Superfund contract activity found that as much as 30% of contractor costs were questionable. *See Management of Superfund*, at 10.

[21] GAO, *Program Management Costs, 1993*, at 32-33 (Arthur Little claimed $70,000 for entertainment in its indirect costs pool, including an alumni dinner and Christmas parties).

[22] "Dingell Finds More Fault with CH2M Contracting Work," *Pesticide & Toxic Chem. News*, Aug. 19, 1992, at 11 (statement of Rep. Dingell, whose House Energy and Commerce Committee has been investigating EPA's Superfund expenditures). The House Government & Operations Committee subcommittee has found similar waste in the charges of other contractors, concluding that the "Superfund program is . . . a program where money is being wasted at every turn." "ARCS Contractors Under Congressional Microscope: House Government & Operations Panel Probes Contracting Expenses," VI *Inside EPA's Superfund Report*, April 22, 1992, at 6 (statement of Rep. Synar).

[23] In one celebrated case involving a superfund claim brought by the State of Michigan, among the charges for which the state sought recovery were telephone calls to "900" adult entertainment phone numbers that were made from a trailer at the site. *See* Deposition of Gary Hoffman, *Kelley* v. *E.I. DuPont de Nemours & Co.*, No. 90-CV-72028-DT, at 9 (E.D. Mich. Dec. 20, 1990) (Q: I trust, sir, that you will agree that the Forbidden fantasies of Alexis C—a seductive nymph, were probably not consistent with the NCP? A: I would not think they would be, no.). Under the "all" costs theory, however, none of EPA's telephone charges could be challenged, no matter how outrageous.

The waste and abuse of the Superfund is not, however, limited to those blatantly inappropriate charges. The entire Alternative Remedial Contracting Strategy ("ARCS") has been fraught with waste since it was created in 1988. Under its ARCS contracts, EPA has paid millions of dollars in "program management" costs which have had little or no relation to cleanup of hazardous waste sites. In the words of one EPA official: "We have a mess on our hands." [24] It is a mess that EPA Administrator Browner has testified before Congress persists to this day.[25] EPA expended huge initial costs on program management before it knew what the cleanup workload would be. EPA paid for office space, staff and equipment for contractors who remained largely idle. More than $105 million (23%) of the $465 million paid to EPA's ARCS contractors through September 1992 went to "program management." [26] Of that, there are numerous individual examples of waste. One San Francisco ARCS contractor listed as a "significant accomplishment[]" in its monthly report to EPA that it "achieved required target of $60,000 in monthly program management costs." [27] More than $100,000 was spent for office space in Dallas for another contractor, but there was not enough work to support two key employees who instead were flown in for meetings at a cost of $40,000.[28] Some

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[24] Michael Weisskopf, "Administrative Costs Drain Superfund: Few Toxic Waste Sites Actually Cleaned Up," *Wash. Post*, June 19, 1991, at A1, A14 (*"Wash. Post"*) (statement of David J. O'Connor, Director of Procurement and Contracts Management, EPA).

[25] *See EPA Contracting: Hearing Before the Subcomm. on Oversight and Investigations of the House Comm. on Energy and Commerce*, 103d Cong., 1st Sess. 7-11 (1993) (testimony of Carol M. Browner, Administrator, EPA).

[26] GAO, *Program Management Costs, 1993*, at 4.

[27] *Wash. Post* at A14 (internal quotations omitted). Looking ahead to "major activities" for the coming months, the contractor noted plans to "prepare a new manhour and cost forecast" and "compile data" for an upcoming EPA review of its books. *Id.*

[28] *Id.*

$5.5 million worth of scientific instruments, vehicles, and protective clothing was purchased, much of which sat idle. Contractors were paid for business cards and potted plants, and even to prepare self-evaluations to justify award fees.[29]

While EPA has taken some measures to control ARCS program management costs, the response was slow and millions of dollars were wasted in the interim.[30] EPA was aware of the problems in October 1989.[31] Yet, GAO reported to Congress in 1991 that EPA still had not taken the appropriate steps to deal with the problem.[32] Now, two years later, in June of 1993, GAO reports that EPA has "repeatedly studied the ARCS program management cost issues" but has yet to act to reduce fully the overcapacity at the core of the problem.[33] As a result, significant excess capacity still remains that ultimately may cost the government millions in unnecessary program management costs.[34]

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[29] *Id.* (EPA paid $6,000 to contractor for 70 page self appraisal for award fee).

[30] Moreover, while ARCS was designed to accelerate the cleanup process, EPA's Inspector General has found that ARCS has failed to meet EPA's goals. Indeed, "rather than being accelerated, the remediation of Superfund sites has been delayed. In large measure the delays occurred because of poor performance by the contractors, and a lack of effective administration by the Agency." Office of the Inspector General, EPA, *Report of Audit: Final Report of Audit on Superfund Alternative Remedial Contract Strategy (ARCS) Contracts in Regions 1, 3, and 5* 25 (Feb. 3, 1992) ("*ARCS Audit*").

[31] Booz, Allen & Hamilton, Inc., *Analysis of ARCS Program Management Operations* (Oct. 28, 1989), *cited in* GAO, *Superfund: EPA Has Not Corrected Long-Standing Contract Management Problems* (GAO/RCED-92-45) (Oct. 24, 1991).

[32] *See* GAO, *Superfund: EPA Has Not Corrected Long-Standing Contract Management Problems* (GAO/RCED-92-45) (Oct. 24, 1991).

[33] GAO, *Program Management Costs, 1993*, at 29-30.

[34] *Id.* at 38.

Contracting mismanagement, however, is not new to the Superfund program.[35] A series of audits[36] and reports by GAO and EPA's own Inspector General have illustrated that "actions are needed to correct long-standing contract management problems" because EPA has repeatedly failed to follow "basic contract management techniques."[37] Moreover, an EPA task force recognized that the

> system of internal controls in the ARCS contract administration process does not provide reasonable assurance that Superfund contracting resources are protected against waste and inefficiency. Documented weaknesses in cost monitoring, technical performance monitoring, independent Government cost estimate preparation and work assignment issuance have been present since the inception of the ARCS program . . .[38]

EPA, for example, has consistently failed adequately to review contractor cost proposals and to prepare an in-

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[35] As early as 1985, GAO questioned EPA's Superfund contracting practices. *See* GAO, *The Environmental Protection Agency Should Better Manage its Use of Contractors* (GAO/RCED-85-12) (Jan. 4, 1985). In 1988, GAO followed up with an in-depth analysis of EPA's Superfund contracting problems. GAO, *Superfund Contracts: EPA Needs to Control Contractor Costs* (GAO/RCED-88-182) ("GAO, *Contracts Report, 1988*").

[36] While government audits highlight the problems with Superfund, they do not provide a mechanism to provide relief to PRPs. Under the court's ruling, all costs must be paid, no matter how unreasonable. Moreover, audits are performed long after EPA demands reimbursement of the funds. Indeed, the government is many years behind in its audits of Superfund contractors and contracts. GAO, *EPA's Contract Management: Audit Backlogs and Audit Follow-up Problems Undermine EPA's Contract Management* 1, 5-7 (GAO/T-RCED-91-5) (Dec. 11, 1990).

[37] GAO, *Long-Standing Contract Management Problems, 1992*, at 3.

[38] EPA, Administrator's ARCS Contracts Task Force Report (Oct. 1991), *cited in ARCS Audit*, at 27.

dependent government estimate.[39] According to the GAO, "[i]n the absence of adequate cost control, contractors' studies have been getting more expensive."[40] An EPA consultant determined that the doubling of the costs of the studies that occurred between 1985 and 1988 was caused in part by a lack of adequate cost control.[41]

Along the same lines, in 1986, the EPA IG reported that EPA was already paying an excessive markup on equipment purchased by its contractors. EPA was basing payment on the price quoted to them by the contractor, rather than analyzing the actual cost. As a result, EPA paid "an average of 321 percent markup on equipment items to some of its largest Superfund contractors . . ."[42] Rather than correct the problem, however, EPA continued awarding contracts to the same contractors without changing its analysis. Thus, according to the IG, "[t]he average markup over cost for equipment billed to EPA had then grown to 427 percent, 100 percentage points higher than it was in 1986."[43]

Further, GAO's 1988 Report on EPA's contracting found that most of EPA's project managers, the only real internal EPA control on how money is spent at a site, did not review and verify contractor invoices.[44] "Con-

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[39] The FARs require an independent estimate of the cost of architect-engineer services on each proposed contract or contract modification expected to exceed more than $25,000. The FAR stipulates that the analysis supporting the estimate should be prepared as thoroughly as though the government was submitting a proposal itself. *See* 48 C.F.R. § 36.203(a).

[40] GAO, *Long-Standing Contract Management Problems, 1992*, at 4.

[41] *Id.* at 4.

[42] *EPA: Contract Mismanagement: Hearings Before the Subcomm. on Oversight and Investigations of the House Comm. on Energy and Commerce*, 102d Cong., 2d Sess. 331 (July 8, 1992) (testimony of John C. Martin, Inspector General, EPA).

[43] *Id.*

[44] GAO, *Contracts Report, 1988*, at 38-41.

sequently, EPA did not determine whether contractor costs were reasonable." [45] This was confirmed in an independent audit report by EPA's IG who concluded that contractors were "paid millions of dollars by EPA without an adequate review of the invoices for propriety." [46] More recently, according to the GAO in its follow-up report in 1992, although EPA now required such review, EPA contracting officials believe that about half the invoices were never reviewed.[47]

In addition, both GAO and EPA's IG have found that EPA has not only paid in full for less than satisfactory performance, it often granted contractors award fees who performed deficient work. The GAO reported in 1988 that EPA had approved full payment of increased costs notwithstanding inadequate contractor and subcontractor performance.[48] Moreover, EPA's IG found that inadequate contractor performance increased costs and work had to be repeated.[49] The IG also found that EPA has paid excessive charges for technical work by underqualified personnel and paid senior engineers to perform filing

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[45] GAO, *Contracts Report, 1988*, at 41.

[46] Office of the Inspector General, EPA, *Report of Audit on the Management of Technical Assistance Team Services* 20 (Sept. 28, 1988) ("*TAT Report*").

[47] GAO, *Long-Standing Contract Management Problems, 1992*, at 4.

[48] EPA determined contractors placed monitoring wells in the wrong place, made errors in preparing groundwater samples, and inadequately prepared reports. In one case the contractor who hired a subcontractor to write an EPA report had to redo the subcontractor's poor work. EPA paid the contractor $40,000 to redo the work, plus a base fee. GAO, *Contracts Report, 1988*, at 25.

[49] Office of the Inspector General, EPA, *Report of Audit on EPA's Utilization Zone I Field Investigation Team* 21-22 (Sept. 30, 1988) ("*FIT Report*") (found "useless modeling work, inoperable equipment, and reports "poorly written, technically inaccurate, and . . . repeatedly returned for correction").

and other administrative tasks.[50] Nonetheless, EPA repeatedly paid base and award fees to contractors that provided this deficient work.[51] These wasteful practices have continued, despite repeated criticisms by GAO and EPA's IG.[52]

In sum, the actions of EPA in ignoring fraud and abuse fully explain its legal position in this and other Superfund litigation, but it hardly justifies insulating EPA's failures from all judicial scrutiny. To the contrary, as corporate budgets generally shrink with the economy's downturn, the Superfund program simply cannot continue to be replenished for all costs, no matter how wasteful. Instead, EPA should be subject to deferential reasonableness review. The refusal of the court of appeals to allow any review of the costs warrants review by this Court.

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[50] *TAT Report*, at 5, 8-15; Office of the Inspector General, EPA, *Annual Superfund Report to the Congress for Fiscal 1988* 33 (Sept. 1989).

[51] Office of the Inspector General, EPA, *Report of Audit on Superfund Cost-Plus-Award-Fee Contracts* 11, 15 (March 28, 1990) (contractors paid award fees for deficient work; unreasonable charges); *FIT Report*, at 19 (contractor was paid award fees for deficient work, as well as for work that was beyond the scope of the contract); GAO, *Contracts Report, 1988*, at 48-51.

[52] Moreover, new allegations of fraud and mismanagement are under investigation. It is alleged that EPA personnel claimed that numerous studies of sites had been performed between 1988 and 1991, when in fact they had not been done. EPA employees then asked EPA contractors to create reports to back-up the claims. Senators Lautenberg and Boxer have called for an investigation of these claims. *See* Letter from Sens. Lautenberg and Boxer to Att'y General Reno of June 10, 1993. Moreover, at the Helen Kramer Landfill a criminal investigation is ongoing to investigate $50 million in cost overruns by the remedial contractor.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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